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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

No. 511

BRIEF OF APPELLEES, REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, and ILLINOIS-MINNESOTA MOTOR CARRIERS' CONFERENCE.

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The Regular Common Carrier Conference of the American Trucking Associations and the Illinois-Minnesota Motor Carriers' Conference are appellees in this case by reason of their participation in the proceedings in the District Court of the United States which permitted their intervention pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913, Sec. 45a, Title 28, U. S. C. A., 38 Stat. 220.

The Illinois-Minnesota Motor Carriers' Conference, being representative of common motor carriers, operating between Chicago and Minneapolis-St. Paul, was a protestant in the proceedings involving appellant's grand-

father application before the Interstate Commerce Commission.

The position of the appellee Conferences is as follows:

(1) That the Commission has properly interpreted the Interstate Commerce Act, and has, accordingly, restricted appellant to the rendition of transportation service as a contract carrier under individual contracts with persons who operate food canneries or meat-packing businesses.

(2) That the Commission has properly decided the application both as regard the commodities to be hauled and the territory and points to be served.

We, therefore, believe that the action of the District Court should be affirmed, as it had sustained the Commission.

STATEMENT OF THE CASE.

For a better understanding of the operations of the appellant, it is necessary to supplement the statement of the case appearing in appellant's brief. When those operations, as they were conducted on July 1, 1935, are understood, it will be apparent that the Commission has in no way deprived appellant of his grandfather rights, but has been liberal in its grant of commodity and territorial authority; while at the same time, it has appropriately described the scope of his business as the Act intends. Only an examination of those facts make clear the reasonableness of the so-called restriction in appellant's authority, the accuracy of the limitation that appellant shall serve only food canneries and packing houses, the need for such description of the class of shippers which he may serve and the manifest intent of Congress that the Commission should insert such description in permits when found necessary.

Appellant's operations were revealed to the Commission in (1) his application, (2) his testimony before the Examiner and (3) his exhibits introduced at such hearing. His complaint for an injunction filed in the District Court contains certain pertinent matter. The Commission's decision analyzes the evidence and justifies the *description* of the operation which appellant chooses to call a *restriction*. Direction of attention to certain parts of the Commission's decision is essential to an appreciation of the need for the establishment of the classes of shippers whom appellant may serve and was necessary to fulfill the obligation placed upon the Commission by Sec. 209(b) of the Act, in the following provision:

> "* * * The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it at the

time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier; the requirements established by the Commission under Sec. 204(a) (2) and (6). * * *"

The question before this court is whether the following finding is in accord with the evidence and contains the basis for the specification of appellant's business in the permit to be issued:

"Findings: We find that on July 1, 1935, and continuously since, appellant has been in bona fide operation as a contract carrier * * * under individual contracts with persons * * * who operate food canneries or meat-packing houses, (a) of canned foods from Blue Island, Illinois, to St. Paul * * * and (b) of fresh meats, canned foods, dairy products, and packing house products and supplies, from South St. Paul to Grand Forks, North Dakota, Chicago and Rockford, Illinois, and points in that portion of Wisconsin * * * and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona and Rochester, Minnesota, and La Crosse, Wisconsin, over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations. * * *"

The appellant fails to point out any particular in which this grant of authority deprives him from continuing to do what he was doing on July 1, 1935. That is one very certain test for determining whether his application has been dealt with justly by the Commission. The appellee, Illinois-Minnesota Motor Carriers' Conference, has not opposed this grant of authority.

THE APPLICATION FILED WITH THE COMMISSION UNDER THE GRANDFATHER CLAUSE.

This application which is part of the certified record contains the following pertinent matter:

(1) Appellant gave his business address as South St. Paul.

(2) He asked for a permit as a contract carrier.

(3) He stated he did not haul for the general public.

(4) He hauled under special, written contracts for Swift and Company, Libby, McNeill and Libby, Plankington Packing Company and others.

(5) The commodities transported were: Commodities generally, meat and packing house products especially.

(6) On July 1, 1935, he had four tractors and four semi-trailers.

(7) In describing his business, he said:

> "Applicant is principally engaged in the business of delivering meats and packing-house products for Swift & Company, South St. Paul, Minnesota to various municipalities, towns and cities within the states of Minnesota, Wisconsin, Illinois, Iowa and North Dakota, and is engaged under contract with various concerns in the movement of freight from Chicago and Milwaukee and adjacent towns to St. Paul, South St. Paul, Minneapolis, and various points in Minnesota."

Had appellant been granted authority on the basis of his application without a hearing, who could question the propriety of the Commission's granting him a permit as a contract carrier to transport meats and packing house products for packing houses and for food canneries (such as Libby, McNeill and Libby) from South St. Paul to the

area of distribution of the packing house products and from Chicago to the Twin Cities area? He revealed a devotion to particular classes of shippers and it must be admitted that he made his application as broad as he could, consistent with the fact that it was under oath.

What the Commission granted him is as broad as his application except that he was not given all of the territory applied for, because he had not served much of it.

MR. NOBLE'S TESTIMONY BEFORE THE EXAMINER ON SEPTEMBER 21, 1938.

Mr. Noble testified (R. 38) that he began his operation as a contract carrier working for Swift & Co., which is a packer. He contracted with Swift to place trucks at its disposal for use out of its South St. Paul packing plant. The agreement included the movement of commodities out of Chicago exclusively for Swift and its subsidiaries. Swift at South St. Paul would furnish a load in one direction, usually tying it up with a return load coming from some point fairly adjacent to the point to which Noble was sent. Swift operates a packing plant at South St. Paul (R. 39).

The operation, beginning in November, 1934, and continuing to July 7, 1935, was from South St. Paul, Minneapolis and St. Paul for Swift & Co. to various points in Wisconsin, Iowa, Illinois, and North Dakota, and from various places in Illinois, Iowa and Wisconsin to various places in Minnesota, and from Iowa to places in Illinois (R. 48).

The commodities hauled were fresh meat, packing house products, canned goods, butter, poultry, eggs and supplies of all kinds, such as machinery, chemicals and articles too numerous to mention, sometimes referred to as branch house supplies (R. 48).

In February, 1935, Swift & Co., called Noble with a view to his making store-door deliveries to various places in Wisconsin (R. 49). Prior to this he had hauled from the Swift plant at South St. Paul to a break bulk point in Wisconsin or northern Illinois with other carriers providing the service from the break bulk point to the consignee's door (R. 50, 53). Thereafter, he was to supply the complete service from the plant to the store-door.

In the case of Noble's peddler trucks, the final destination was oftentimes Milwaukee, Chicago, Fond du Lac or some other point at which Swift, quite frequently, *would have a return load to take back* (R. 53). It was Swift's policy to give Noble a return load of some of its commodities out of Chicago to some destination on the way back to St. Paul. That was done and is being done (R. 54). The schedule might be to go to either Chicago or Milwaukee for a return load or it might be to go to Marshfield for a return load of cheese. Only in rare instances did the truck deadhead empty to St. Paul. It might deadhead to Chicago for the return load (R. 54).

Noble also entered into a contract with Libby, McNeill and Libby in February, 1935, for the transportation of canned goods, including preserves, meat, milk and other edibles. These shipments were arranged for Libby through Swift & Co. and moved from Libby's plant at Blue Island, Illinois, adjacent to Chicago, to Wisconsin or Minnesota points (R. 55).

Exhibits 3, 4, 5, 6, 7 and 8 were introduced (R. 60) listing the shipments handled to a major break-bulk point such as Wisconsin Rapids, Beaver Dam and Burlington (R. 61). The truck destined to Eau Claire would peddle to points in its vicinity (R. 66).

EXHIBITS PRODUCED BEFORE THE EXAMINER

Exhibit 5 was admitted in evidence (R. 60) and is typical of the lists of shipments introduced by Noble to prove actual operations. It indicates the dates, points between which the shipments moved, and the commodities transported. This exhibit is referred to because it covers the critical period from November 17, 1934, to July 1, 1935, the grandfather date.

This method of proving actual operations was that employed in the conduct of all grandfather cases. The statute gave rights on the basis of actual operations and not on the basis of the claims made in the applications only.

The significance of Exhibit 5, covering the crucial period as it does, is as follows:

(1) It shows that only Swift & Co., or Libby, McNeill and Libby were served.

(2) The point of origin was invariably South St. Paul or Chicago, with a few shipments from Milwaukee, Blue Island, Rockford, Beaver Dam and Sioux City.

(3) The destination points from the South St. Paul plant were such points as Janesville, Beaver Dam, Burlington, Wausau, Kenosha and other points, all of which are within the destination territory granted by the Commission.

(4) The destination points on the shipments from Chicago were either granted by the Commission, or the testimony indicated that they had been hauled only sporadically or had been transferred to another carrier at Minneapolis for delivery to the destination shown in the exhibit.

Again appellees make the point that appellant has not shown that the Commission has denied him the right to continue to do what he was doing on July 1, 1935. In fact,

the Commission has treated him with liberality in outlining the Wisconsin territory, some of the points not having been served for the first time until 1937 (R. 216, 224).

Exhibit 6 covers the period from July 1, 1935, to October 15, 1935, and in each instance the shipper is Swift & Co.

As an illustration of the commodities transported, a shipment handled for Swift on February 15, 1935, from Chicago to Winona consisted of empty containers, bags of asphalt, rope, ammonia, paint, tires, liquid glue, sheep casings, cartons, bars of pig lead, overalls, etc. (R. 163).

A contract was entered into with the Kraft Phenix Corporation on July 1, 1935, but hauling under it did not commence until March, 1936 (R. 190).

In the exhibits listing the shipments transported by Noble, Derby Foods, Inc., G. H. Hammond Co., Omaha Packing Co., Container Corporation, Rockford Fiber Corporation appears as consignor or consignee, but these shipments were all under the contract between Noble and Swift (R. 192, 193, 198).

Mr. Noble did not commence to serve Eau Claire, Wisconsin, a break bulk point, and towns in its circuity, for Swift until 1937 (R216-224), and this business he took away from Glendenning Transfer Service, (R. 224) a common carrier, which had served the points from 1932 (R. 317).

THE COMPLAINT FOR INJUNCTION FILED IN THE UNITED STATES DISTRICT COURT.

The proceeding was instituted November 8, 1941, and in his complaint appellant admits the following:

(1) That he has entered into 120 contracts, of which 83 are in existence (R. 11).

(2) They relate to the transportation of the same or related articles, such as were handled for Swift, Libby or Kraft.

(3) That he now has 22 tractors, 22 trailers and 7 straight trucks.

Reference is made to these facts because they may bring more meaning to the decisions of the Commission hereinafter referred to, dealing with the need for protecting common carriers by defining the type of service which contract carriers are intended to render.

The growth of applicant occurs during a time when his application is pending and he is under no restraint as to the class of shippers whom he may serve. Without the guidance and limitation of a restrictive clause such as the Commission would embody in his permit, he has added contracts promiscuously and is undoubtedly performing a common carrier operation under the guise of contract carriage.

Applicant's growth is out of all proportion to the growth in traffic in the period in question. It follows that he has taken business from common carriers and his case portrays the evils that will eventually result if the Commission does not limit the authority of the contract carrier in the pattern here adopted. In some of the cases hereinafter referred to, the Commission has found that contract carriers have attracted business from common carriers by reason of lower rates. Contract carrier rate cutting assumed alarming proportions and compelled the adoption of certain requirements designed to putting a stop to such practices.

ARGUMENT.

I.

The Commission is required under Sec. 209(b) of Part II of the Interstate Commerce Act to specify in the permit the business of the contract carrier covered thereby and the scope thereof and to attach such reasonable terms and conditions as are necessary to carry out the requirements established by the Commission under Sec. 204(a) (2) and (6). This authorizes the Commission to limit the service of contract carriers to particular classes of shippers.

This is in answer to Point II of appellant's brief.

In the case at bar, the Commission stated (R. 22) that applicant's service was not similar to that of a common carrier but rather that of a carrier of canned goods, packing house and related products in the manner above described. Hence, the form of authority to be issued to Noble was decided on the basis of the Commission's decision in *Keystone Transportation Company* contract carrier application, 19 MCC 476.

The *Keystone* case was decided October 19, 1939, and was selected by the Commission as a test case for the purpose of determining both its power and its duty with respect to the statutory requirement that it define the scope of the permit of a contract carrier. Reference to the decision will indicate the great number of counsel who appeared at the invitation of the Commission to aid in the determination of the problem. By that time, the Act had been in force for five years. Certain corrective measures had been taken by the Commission from time to time to keep in proper balance the spheres of common and contract carriers. In the decision of the *Keystone* and companion cases, the Commission had the benefit of the experience and

ability of counsel representing shippers, shipper associations, state public utility commissions, railroads and common and contract motor carriers.

Chairman Eastman's concurring opinion (R. 496) opens with a review of the conditions prompting the enactment of Federal legislation to regulate the motor carrier industry. He recalled that common carriers are a public institution subject to severe legal obligations which include their responsibility to serve all who seek their services, with equality and fairness. They may not pick and choose their shippers. Regulatory power in the new Act as well as in the original Interstate Commerce Act was designed to enforce these basic obligations comprehensively and strictly. It is upon common carriers that the general public must depend for adequate and efficient transportation and, accordingly, their proper protection against conditions which will undermine and sap their ability to perform such transportation is of the very essence of regulation. Contract carriers, on the other hand, are not engaged in a public business and are not the transportation servants of the general public. They may pick and choose their customers. Prior to the Act, Mr. Eastman states, the transportation industry was in an unsound economic condition, competition was running wild, unjust discriminations abounded, facilities were being multiplied without plan and in disregard of public need, and both carriers and shippers were suffering. Confronted with such conditions, and recognizing certain inherent advantages in the motor carrier industry in peace and in war, Congress enacted the Motor Carrier Act in which it made clear its declaration of policy that it would regulate transportation in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation; promote adequate, economical and efficient service by

motor carriers and reasonable charges, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices.

Further characteristics of the contract carrier, operating within its legitimate sphere, were drawn by Mr. Eastman. Its function is to furnish a specialized and individual service which is required by the peculiar needs of a particular shipper, and which a common carrier cannot well undertake. If contract carriers are confined to this function, they cannot endanger the performance by common carriers of their public function. If not so confined, contract carriers will inevitably poach upon the most profitable business of the common carriers, taking the cream of the business and leaving the skim-milk to the common carriers to the disadvantage of both themselves and the general public.

The Commission reaches the conclusion that contract carriers serving shippers who handle a wide range of commodities, such as chain stores, a permit which would permit the hauling of such commodities as are dealt in by chain stores would prove inadequate as the carrier would add contracts with any class of shipper whose commodities fell within the wide group handled by chain stores. The only effective way of keeping such a contract carrier within due bounds was to limit the class of shippers which he might serve.

It may be recognized that since the inception of the Act; and during the period when grandfather applications are being determined, it has been difficult in some instances, for a carrier to determine whether new operations fall within the scope of his operations as of the grandfather date. If the new operation is within such bounds, his competitors have recognized this. To the common carriers it seems that in most instances such extensions of contract

carriers fell outside the scope of operations conducted on the grandfather date, and, accordingly, the new contract should not have been entered into and service inaugurated without the filing of an application under Sec. 209 and proof that the new operation was consistent with the public interest. Rarely did the contract carrier resort to the Commission. Like appellant, who has skyrocketed the number of his contracts from the couple existing on the grandfather date to 120 at this time, most contract carriers resolved any question as to their right to add a particular contract in their own favor. Their answer is the same as that of appellant. As he had hauled everything from abrasives to zinc, as a packing house supply, he felt he could perform transportation service for any type of shipper of any commodity found in the extensive list denominated "packing house products and supplies", so long as the service was performed within the territory claimed in the application. The Commission would not stop such addition until it had determined the grandfather application. In the meantime, common carriers found their most lucrative business taken from them by contract carriers. The situation illustrates very clearly what would happen if, on final determination of the contract carrier applications, the Commission cannot, or will not, define the scope of the contract carriers in terms of the class of shippers which they have served. It was this situation which the Commission had in mind in stating in the *Keystone* case (19 MCC 491):

> "The argument herein presents a vivid picture of the struggle for competitive advantage, and possibly in some instances, even survival, between motor contract carriers and common carriers. The common carrier is required to serve the general public within the limits of its facilities, at its published rates, without discrimination. • • • Obviously, the contract carrier then, in competing for certain classes of traffic

with the common carrier, has a substantial advantage. It may secure by contract a continuous flow of traffic and thereby acquire a stability of operation not possible for a carrier serving the general public; and the shipper served or to be served, justified his need for contract carrier service on the grounds of its special character and its adaptability to the demands of his business.

This competitive situation has existed in the motor carrier industry for some time and was within the knowledge of the Congress when the motor carrier law was enacted. Control of this situation was clearly contemplated."

Against this background, the Commission proceeded to consider the meaning of the statute enjoining upon it the duty of specifying in the permit "the business of the contract carrier covered thereby and the scope thereof," and it interprets this language as follows (P. 493):

"The phrase * * * plainly means more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes, in addition to the business of being a contract carrier, the exact and precise character of the service to be rendered by such carrier. When so considered, it is clear that we have the power to incorporate in a permit the territory and points to be served, the commodities to be transported, the equipment to be used, and any other specification necessary to describe the service authorized, even to the extent of limiting the service to be rendered to that of a particular type, such as that rendered a retail food store. * * * That a specific classification of the business of a contract carrier was intended is indicated clearly by Sec. 204(e), wherein we are authorized to establish reasonable classifications of common and contract carriers by motor vehicle as the special nature of the services performed by such carriers shall require, and such reasonable rules, regulations and requirements to be observed by such car-

riers as we may deem necessary or desirable in the public interest.

"Next we are given power to attach to a permit, at the time of issuance and thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as are necessary to carry out, with respect to the operations of the carrier, the requirements established by us under Sec. 204 (a) (2) and (6). Examples of such requirements are those established in *Contracts of Contract Carriers, supra*, with respect to the terms of contracts under which a contract carrier may operate. Permits granted by us are made subject to those requirements."

Certainly the meaning of the words "the business of the contract carrier" and "the scope thereof" are better judged by the circumstances giving rise to their use. It cannot be fairly contended that the Commission has misconstrued the meaning of these phrases. Their administrative responsibility would be seriously impaired if they were required to ignore the conditions which they have found to exist in the performance of their duties, and, based thereon, to adopt the corrective which they feel to be necessary.

II.

Contract carriage is a substitute for private carriage and the inclusion of a clause limiting service to a particular class of shippers is a proper identification of the carrier service with that of the shippers whom he may serve.

Applicant has chosen to be a contract carrier. He has performed service under special contracts. He has not held himself out to serve the public. He has performed a specialized service integrated to the needs of the shippers served on the grandfather date and has substituted his service for that which they might have performed on their own behalf in their own equipment. The

restrictive clause serves to protect common carriers from the performance of service by a contract carrier outside his legitimate scope.

In *Contracts of Contract Carriers*, 1 MCC 628, the Commission held that contract carriage is a form of private carriage; that state and federal regulation of contract carriers was designed to protect and foster an adequate, common carrier, transportation system providing a nondiscriminatory service at uniform rates; and that the patent object of Congress is to protect common carriers against cut-throat competition. The Commission pointed out the advantage which contract carriers have over common carriers in their ability to render a discriminatory service, thereby attracting shippers who have a steady volume of traffic. This tendency to entice away the most lucrative traffic has become a positive peril to common carriers (P. 631). In order, therefore, to avoid the promiscuous addition of contracts, the Commission established a requirement (P. 632) that contract carriers shall transport under written agreements which shall provide transportation for particular shippers and which shall be bilateral in form and impose specific obligations upon both the carrier and shippers. By the last was meant a guarantee of tonnage which the shipper would turn over and the carrier would accept. The proposed service was required to be with respect to a series of shipments, which at once negatived any general holding out by the contract carrier and indicated a dependence on the carrier as though the service was that of private carriage.

When the implication of these requirements is discerned, it is seen that the contract carrier is so closely identified with the shippers whom he is serving as to disqualify himself from competing with common carriers in most cases.

This expedient was found necessary by the Commission to protect common carriers from the loss of their choicest traffic to contract carriers. If the shipper, planning his traffic needs with respect to a series of shipments, will contract accordingly, and if the service is special in nature, fitted to the shipper's requirements, there is no right on the Commission's part to deprive him of contract carrier service. Any less need than this implies that the shipper will have to depend on common carrier service. The coupling of the service which the contract carrier is qualified to perform with the type of shipper whom he is to serve, works no hardship on the former or either.

That the Commission has properly evaluated the Congressional intent to protect common carriers is evidenced by *Stephenson* v. *Binford*, 287 U. S. 251, 273, 274. See also *Fordham Bus Corp.* v. *U. S.*, 38 F. Supp. 739.

Another decision of the Commission revealing the competitive disadvantage of the common carriers unless they are given the protection intended by the Act is *In the Matter of Filing of Contracts by Contract Carriers*, 20 MCC 8. The Commission states as follows (P. 10):

> "It is generally conceded that many self-styled contract carriers are not in fact contract carriers and are offering nothing in the way of specialized services usually typical of such operations, but rather, pending a final determination of their status, are extensively engaging in operations directly competitive with established common carriers, applying rates known only to themselves and their shippers, and otherwise engaging in practices forbidden to common carriers."

The disclosure of this condition indicates the need for the relief proposed in the *Keystone* case. It is insufficient that a carrier simply denominates himself a contract carrier. The identification of his service with certain classes of

shippers protects those with whom he has contracts and is some assurance to them that he will provide service when called upon to do so. The Commission is well aware that contract carriers whose rights are not determined piled contract on contract with the result that the shippers must still rely on the common carrier.

We wonder whether the Commission knows what the appellant wants which he does not have in order to continue to serve the packing houses and canneries served on the grandfather date. He has not pointed out any service within the scope of his operations which he was performing on July 1, 1935, which he cannot provide under the proposed order. We know what he wants and that is absolute freedom of choice in selecting shippers with the most attractive traffic and inducing them to turn to him on the basis of lower rates which, in some instances, he may be able to give because he does not have to provide service to all, regardless of the value of the traffic. At first blush it might seem that if the contract carrier can render service cheaper, he has justified himself. The fact is that few shippers have their transportation needs satisfied by contract carriers. They will turn to common carriers for the handling of their less than truck load traffic even though it may be the part most expensive to handle. They have thus failed to pay their fare share along with other shippers of the cost of providing the ever present common carrier service.

One might be tempted to believe that we over-emphasize the necessity of the restriction which the Commission formulated in the *Keystone* case; but an examination of the legislation of the various states regulating intrastate traffic reveals a uniform need to protect the common carriers and the adoption of various kinds of expedients to accomplish it, such as an arbitrary provision that a prescribed

number of contracts automatically converts the carrier into a common carrier.

Where an extension of authority is sought to permit a new operation by a contract carrier, the Commission is in a position to test the propriety of the proposal and to afford protection to the common carrier. The restrictive clause is designed to insure a similar measure of protection when the carrier merely adds the contract without resorting to the Commission. The identification of the carrier's authority with a given class of shippers tends to guide any extension of the proposed service to instances where a special and individual service is required by the needs of a particular shipper. In *Merrill M. Pregler*, 18 MCC 257, the Commission said:

> "The difference between common and contract carriage is inherent in the service rendered and accounts for the difference in regulations as provided in the Act, including, except in the case of a grandfather application, a showing of public convenience and necessity in the case of certificate applications, and of consistency with the public interest and policy declared in Sec. 202(a) of the Act in the case of permit applications.' The foregoing is entirely in keeping not only with the provisions of Sec. 203(b) (15) and (16), but all other provisions of the Act which leave no room for those who would render a common carrier service under the guise of contract carriage. Otherwise, there can be no effective control of the transportation facilities of the nation to the end that an adequate and nondiscriminatory system can be maintained, and there can be no effective regulation of rates and charges. We are of the opinion that the proposed operations are those of a common carrier by motor vehicle."

In *N. S. Craig*, 28 MCC 629, the Commission considered the change in the statutory definition of a contract carrier as it appears in the 1935 Act and 1940 Transportation Act,

and answers the argument advanced by appellant (Brief, p. 18). The decision points out that the making of a large number of contracts strongly suggests a holding out and the conversion of the carrier to common carriage. Had appellant been adding contracts in obedience to the restrictive clause proposed by the Commission, he could not have added over one hundred contracts to jeopardize his status as a contract carrier.

The *N. S. Craig* application (31 MCC 705) came before the entire Commission on reconsideration, which found that the change in the definition of "common carriers" under the 1935 and 1940 Acts indicated a purpose to make the terminology conform with the usual common law definitions (707) which would mean that more and more carriers, self-denominated as contract carriers, would be recognized as common carriers where no particular classification of shippers had been served, no specialized service performed but actions of the carrier tended to indicate a general holding out. The case is further helpful for the discussion of the distinction between common and private (contract) carriers at common law. We believe this court will recognize that the Commission's discussion of the distinction correctly states the judicial distinction made in the two types of carriers over long periods of time. Private carriage generally meant not only the provision of self service, but also service under contract for another. The operation had a much closer relationship between the contract carrier and his shipper than that between a common carrier and his shipper. Some decisions indicated that the private carrier was liable only as a bailee, but in the interests of protecting the shipper who was parted from his goods by possession and distance, the courts, from the outset, brought into the common carrier status and fixed upon them liability as insurers all who were not significantly wedded to the shippers whom they served. In case of doubt, the carrier was found to be a common carrier.

Reverting to the *Craig* case, *supra*, the Commission held the final test of the distinction between the two types of carriers was the existence or non-existence of a holding out. Lack of specialization in service was an indication that the carrier was not devoting his facilities to meet the peculiar needs of the shipper, and hence, indicated a willingness and readiness to serve anyone whose business was thought profitable.

The decision then contains these significant observations:

> "The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such, for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities, or the supplying of related non-transportation services such as the assembling, placing, or servicing of machinery. Or it may consist of nothing more than the devotion of all of a carrier's efforts to the service of a particular shipper, or, at most, a very limited number of shippers, under a continuing arrangement which makes the carrier virtually a part of the shipper's organization.
>
> We recognize, of course, that even specialization in physical operations does not necessarily negative a common-carriage status where, for example, such physically specialized services are affirmatively held out to all shippers in that particular class of the public having need therefor. But, on the other hand, we are convinced that the lack of one or the other forms of specialization above indicated conclusively negatives contract carriage as contemplated by section 203(b) (15) of the act. This conclusion is very strongly fortified by the fact that when the proposal to amend the statutory definitions of common and contract carriers by motor vehicles by Senate Bill 2009, mentioned above, was before the Congress, one of the

Senate conferees, in presenting to that body the report of the conference committee, used the very language of our then recent report in the *Pregler* case and explained as follows:

> *'It is intended that all over-the-road truckers shall, whenever possible, fall within the description of common carriers.*
>
> 'It is intended by the definition of contract carriers to *limit* that group of those who operate under individual contracts *and* who render a *specialized service* which is required by the *peculiar* needs of a *particular* shipper and *who do not come within the definition of common carriers.*' (Emphasis supplied.)

Adoption of the amended definitions following the explanation constitutes indisputable legislative approval of our prior administrative interpretation of the statutory definitions and, coupled with the declaration above quoted that the sole purpose of the amendment related to another matter, practically forecloses us from any conclusion other than that heretofore reached."

Chairman Eastman's concurring opinion (P. 713) evidences the accuracy of the analysis by the administrative body of the situation existing between common and contract carriers. It indicates the disposition of the Commission not to take precipitate steps even when a problem has arisen and an administrative solution could be invoked. If anything, the Commission's solicitude for contract carriers has deprived common carriers of remedies which have at all times been recognized as existing and helpful. This has resulted in business being taken from common carriers. The contract carriers have no valid ground for contending that the Commission has too eagerly applied measures to protect the non-discriminatory service of common carriers.

The propriety of the Commission's description of appellant as a contract carrier engaged in transporting packing house products and supplies, and canned goods for packing houses, and canneries, is clearer in the light of the *Craig* case, *supra*.

The distinction of specialization of service between common and contract carriers as delineated in the *Pregler* and *Craig* cases, *supra*, has been approved by the courts. *Doyle Transp. Co. v. U. S.*, 45 F. Supp. 691.

With no restrictive clause to guide either the alleged contract carrier or the shipper who uses him, many cases have been brought to the Commission's attention where the carrier, self-denominated as a contract carrier, was, in fact, a common carrier. A few of these cases are:

E. W. McCarthy, Contract Carrier Application, 33 MCC 105.
Montegna & Company, 32 MCC 691.
Freight Transportation, Inc., 32 MCC 742.
Doyle Transfer Co., 32 MCC 234.
Standard Transport Lines, 32 MCC 13.
H. J. Williams, 31 MCC 13.
J. Siegel Trucking Corp., 32 MCC 245.
Wm. Bloodsworth, 32 MCC 507.
Needham's Motor Service, 32 MCC 492.
George Truck, 27 MCC 283.
Lockland Film Service, 33 MCC 588.
Allen Bareford, 32 MCC 611.
Faye and Matthews, 32 MCC 553.
Harvey Jones, 33 MCC 319.

We submit that the shipper, truly in need of a specialized service and a comparable substitute for self service, has an interest in seeing that his contract carrier not only remains such but continues ready to perform that service for him. Does not a suspicion arise in the case of this

appellant that he is no longer performing as a contract carrier? Where is there any substitution for private carriage when about twenty vehicles are serving about one hundred shippers? These new shippers served by appellant, it may be fairly assumed, were taken from common carriers. In the absence of a specialized service which, we submit, appellant does not have the facilities to render, the inducing cause in most instances was a reduction in rates below that of the common carriers.

III.

In granting authority to many contract carriers, the Commission has restricted service to particular classes of shippers where this was deemed necessary.

In *Cole Teaming Co.*, 30 MCC 539, the Commission said (P. 542):

> "In *Keystone Transportation Co.*, 19 MCC 475, the Commission, Division 5, found that the Act empowers us to limit the service under a permit to a class or classes of shippers. It was there concluded that in cases where a contract carrier transports commodities of such scope as to constitute practically general commodities, any authority granted should be limited to the particular class or classes of shippers served. Because of the wide range of commodities transported by applicant for First National Stores, there is here presented a situation similar to that present in the *Keystone* case, and for the reasons given therein, we conclude that any contract carrier authority granted herein should be similarly limited."

In the following cases, the Commission applied the *Keystone* principle:

Knight, Contract Carrier Application, 30 MCC 500.

Jones Extension of Operations, 21 MCC 470.

De Merchants, Contract Carrier Application, 21 MCC 585.

J. B. Stormes, Extension, 21 MCC 604.

Brashear Freight Lines, 33 MCC 279, 291.

Kavanagh, Contract Carrier Application, 33 MCC 581, 583.

Lee Wilson, Contract Carrier Application, 29 MCC 525, 531.

Ohley & McKell, 29 MCC 205, 207.

Pranger, Contract Carrier Application, 29 MCC 153.

In applying the *Keystone* principle in the application of *Stepanek, Contract Carrier*, 21 MCC 612, the Commission said:

> "In order to protect the interests of motor common carriers operating in the same territory which serve the public generally, and *in order to prevent the evolution of the proposed specialized operation into one of a general character, the authority herein granted will be limited so as to authorize service for a class of shippers in the transportation of such commodities as are dealt in by them. Compare Keystone Transportation Co.*, 19 MCC 475." (Italics supplied.)

IV.

Appellant was not entitled to serve between all points and places within his claimed territory.

The evidence indicates what appellant was doing. His base of operations was the Twin Cities area. He was performing a distribution operation as the most important aspect of his service. He has not shown wherein the present description of his territory has deprived him of performing any service for which he had grandfather rights. That is the test. He has been liberally treated. He shows no legitimate right to perform services between all points within the territory.

Appellant refers to the case of *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, as authority for his claim to service between all points in the territory. The distinction which he overlooks is the fact that Carolina Freight Carriers is a common carrier presumed to be ready to handle traffic from any point which he serves. Appellant, as a contract carrier, picks and chooses his customers. It cannot be assumed that he will serve either any shipper or point until he is actually under contract. As was said in the *N. S. Craig* case, 28 MCC 629:

> "One who proposes or offers a specialized service fitting the needs of a particular shipper or shippers has nothing to hold out to the public generally."

In *National Moving and Warehouse Corporation* v. *United States*, 3 Fed. Car. Cas. 80073, ... F. Supp. ..., U. S. D. C., S. D., N. Y., ... Fed. ..., decided December 2, 1942, the court sustained the Commission's refusal to give a non-radial service when it was principally a radial service which had been performed.

We submit that appellant has not been unduly limited in rendering service to the classes of shippers whom he was serving on the grandfather date. Moreover, if an extension is needed, he can get that authority under the statute if the granting of it is consistent with the public interest.

V.

Appellant's contention that Congress intended to Grant a more liberal and elastic permit to grandfather claimants than that to be issued to new claimants is not supported by the statute.

This contention is made as the first point of appellant's brief (P. 16). We believe it is patently false, but a failure to deny it might be implied as an admission on our part.

If the transportation system is to be guided in its growth to achieve the objects set forth in the Congressional policy, it cannot have a privileged class of contract carriers whose permits embrace everything. Regulation would be impossible.

The opening clause of Sec. 209(a) that no person shall engage in business as a contract carrier without a permit is a clear and unambiguous intent to embrace all contract carriers and to differentiate as to none. The differentiation came with respect to the proof required to establish a right to a permit. It assumed in the case of grandfather claimants that as they were in operation they had a legitimate function and place in the transportation field without proof of consistency with the public interest.

While it is not contended by the appellee Conferences that no new contracts could be entered into pending determination of the carrier's application, there is no express authority in the statute authorizing it and the Commission has only followed a policy that new contracts be within the scope of applicant carrier's operations as of the grandfather date. Obviously, if the Act was to bring order out of the chaotic condition it was aimed at relieving, a distinctly new operation had to be eyed both with respect to the rights of the common and contract carriers in the field, and the particular carrier who might be losing the business to the applicant. No better way of frustrating the purposes of the Act could be imagined than that which would give grandfather claimants, common or contract carrier, a preferred status as to what new operations might be instituted.

We witness here a tremendous growth in appellant's business. The operations on the grandfather date presumably were deemed financially sound by the parties. Swift needed appellant, presumably as a distribution carrier

and was aware that trucks could not be economically deadheaded from the final distribution point to the Twin Cities, so his loads were made to end on their outbound journey at Milwaukee or Chicago where Swift had need for service back to the Twin Cities. The right to perform this service has been preserved to appellant on the Commission's proposed authority. How can it fairly be contended that he may create new origin points within the territory without disturbing the carriers already serving these points? It must be remembered that regulation does give a preferred status to the common and contract carriers in the field, and a short-sighted favoritism to a new applicant who may be taking business away from existing carriers, simply creates a new problem. It is just as much in furtherance of a sound economical transportation system to protect certificated and permitted carriers as it is to allow a new one in the field or to grant new authority to a presently authorized carrier. Protection of those in the field is the very essence of the Act and of the theory of regulation. Manifestly, Congress did not intend to freeze all authority as of the grandfather date. It proceeded on the assumption that a substantial service was already being afforded.

Appellant has shown no deficiency in the proposed authority which fails to give him the right to perform any backhaul within the scope of his operations on the grandfather date. He does not show any desired backhaul which he cannot now perform. If there are some, why should he not apply for them under the procedure which Congress has outlined and give the competing carriers an opportunity to have their say and the Commission an opportunity to weigh the proposal in the light of all considerations?

This leads to the answer to the contention in appellant's sixth point (P. 58) that the appellant should have been au-

thorized under his grandfather application to haul for the Kraft-Phenix Cheese Co. The Commission in several cases has already been sustained in its construction that the statute intended to grant authority for actual, rather than for simply planned operations. This contention of appellant lacks all realism. If mere proposed operations afforded the basis of grants of grandfather authority, the sections of the statute dealing with new applications would have been surplusage. Invariably his zeal causes him to forget the existing carriers serving Kraft and Congress intended that such zeal was to be tempered in the interest of all parties.

Conclusion.

The District Court confirmed the decision of the Commission and dismissed the complaint. The Commission has been liberal in its treatment of the application in question. If appellant's operation was workable on the grandfather date, it is certainly workable under the Commission's order and he has classes of substantial shippers to serve in a manner conforming to his own choice of operations. The District Court's decision should be affirmed.

Respectfully submitted,

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Dated this 29th day of March, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 511.—October Term, 1942.

John W. Noble, Doing Business as Noble Transit Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission, et al. } Appeal from the District Court of the United States for the District of Minnesota.

[May 3, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal[1] from the judgment of a three-judge court (45 F. Supp. 793) which dismissed a complaint filed by appellant to review and annul certain restrictive provisions of an order of the Interstate Commerce Commission (28 M. C. C. 653), granting appellant a permit to operate as a contract carrier by motor vehicle under the Motor Carrier Act of 1935 (49 Stat. 543, 49 U. S. C. § 301), now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

Appellant filed an application for a permit as a contract carrier under the "grandfather" clause of § 209(a) of the Act. That section provides that if the contract carrier or his predecessor in interest "was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time", he shall be granted a permit without more. And § 209(b) provides that the Commission "shall specify in the permit the business of the contract carrier covered thereby and the scope thereof."[2]

The Commission found that appellant was not a common carrier of general commodities but a contract carrier[3] of specified com-

[1] Secs. 210 and 238 of the Judicial Code, 28 U. S. C. § 47a, § 345.

[2] Sec. 209(b) also provides that the Commission shall attach certain terms, conditions and limitations to the permit. It goes on to state, however, that those conditions shall not "restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

[3] The term "contract carrier" is defined by § 203(a)(15) as "any person which, under individual contracts or agreements," engages in the transportation by motor vehicle of "passengers or property in interstate or foreign commerce for compensation."

modities. It found in that connection that on and after July 1, 1935, appellant had been "in bona fide operation as a contract carrier" by motor vehicle "under individual contracts" with persons who "operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis., over irregular routes;" 28 M. M. C. p. 660. The Commission accordingly found that appellant was entitled to a permit authorizing "the continuance of such operations".

Appellant's chief objection to that limitation of his rights under the "grandfather" clause is that the Commission has restricted the shippers or types of shippers for whom he may haul the specified commodities. His argument comes down to this: once the territory which he may serve and the commodities which he may haul have been determined; he should be allowed to haul these commodities for any one he chooses within those territorial limits. In the present case appellant hauled under contract miscellaneous supplies for Swift & Co. such as glue, paper, barrels, soap, bolts, thermometers, etc. His argument accordingly is that he should be allowed to haul the same items for any other person in the territory, whatever may be the business of that person and irrespective of the fact that appellant had never had any contract of carriage with him.

The Commission at one time seems to have followed that view. *Longshore Contract Carrier Application*, 2 M. C. C. 480, 481. But it no longer does. *Keystone Transportation Co. Contract Carrier Application*, 19 M. C. C. 475. In the latter case the power and duty of the Commission under § 209 (b) to specify in the permit "the business of the contract carrier covered thereby and the scope thereof" were reexamined. It was held that that phrase meant "more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in ad-

dition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier." 19 M. C. C. 493.

We agree. An accurate description of the "business" of a particular contract carrier and the "scope" of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type or class of shippers served. Unless the words of the Act are given that interpretation, permits under the "grandfather" clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that "substantial parity between future operations and prior *bona fide* operations" which is contemplated by the Act (*Alton R. Co.* v. *United States*, 315 U. S. 15, 22) would be frequently disregarded. The "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion for all practical purposes of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See § 206(a), § 207, and § 209(b).

Since the Commission did not apply an incorrect standard in defining the nature of appellant's business and its scope,[4] our function is at an end. The precise delineation of an enterprise

[4] We do not accede to the suggestion that the permit specification clause in § 209(b) is applicable only to new operators, not to "grandfather" applicants. The Commission has consistently taken the view that it covers both. Motor Convoy, Inc., 2 M. C. C. 197, 200; Wray Wible, 7 M. C. C. 165, 163;

which seeks the protection of the "grandfather" clause has been reserved for the Commission. *United States* v. *Maher*, 307 U. S. 148; *Alton R. Co.* v. *United States*, *supra*; *United States* v. *Carolina Freight Carriers Corp.*, *supra*.

We have considered the other objections raised by the appellant and find them without merit.

Affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

James P. Hunter, 13 M. C. C. 109, 112-113; Marine Trucking Co., Inc., 17 M. C. C. 615. That interpretation is entitled to "great weight". United States v. American Trucking Ass'ns, 310 U. S. 534, 549. It is consistent with the wording of § 209. Paragraph (a) requires a contract carrier to have a "permit" in order to operate as such; and it requires the Commission to issue the permit "without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b)" within the prescribed time limitation.